Court has recognized "incumbent protection" as a valid objective of redistricting. *Bush v. Vera*, 517 U.S. 952, 964 (1996) (with respect to redistricting, "we have recogniżed incumbency protection ... as a legitimate state goal") (citations omitted); *see also Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

Legislators' Motives

The motives of some or all of the legislators who voted for a law are distinct from the law's purpose. Motives are not a valid area of inquiry in statutory analysis. *See Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L.Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned."); *see also McCreary County, Kentucky v. ACLU*, 125 S.Ct. 2722, 2734 (2005) (legislative purpose must "emerge[] from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts"). Legislative history of a law excludes evidence of the personal motives of the individuals who comprise the state entity that made the pronouncement. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 508 (1975) ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."). Any other rule would allow courts to pick and choose from statements or conduct of individual members of a legislative body, in order to ascribe a motive to all members. To avoid this skewing of motives by individuals, a court would have to induce each member of the body to waive Speech or Debate immunity (when a federal law is at issue) or its common law equivalent (for state legislators) and to

appear in court to testify about motive.[5] The court would in effect have to take a roll-call vote to determine the majority motive, if any, for the law. Besides being infeasible, such a courtroom poll might not even resemble the reality at the time of enactment. Therefore, the Court has wisely excluded legislators' motives from the test for legislative purpose. *A fortiori* a court should not impute the motives of non-members who lobbied for a law to the legislature itself.[6] However, even if the motives of some legislators in this case are conflated with the purpose of the law, the purpose remains a valid one. *See Easley*.

Legislation's Effect

The partisan bias in the plan is part of the *effect* of the statute. Partisan bias in a districting plan has been variously defined. To some, it is the degree to which the votes for a party's candidate in a district vary from the statewide voting strength of the party, measured by selecting various statewide races. *See, e.g.*, J.A. at 34-36 (report of Professor Alford). To others, it is the difference in how parties would fare in winning seats, if hypothetically given the same percentage of votes. Brief of *Amici* King *et al.* at 3. There may be other views, but, in any event, partisan bias is a concept distinct from legislative purpose or legislators' motives.

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[5] *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (unanimously reaffirming the existence of common law legislative immunity and clarifying its applicability to local legislators).

[6] For purposes of Texas's congressional redistricting, even Rep. Tom DeLay was not a legislator. He was as free as any citizen to petition the legislature of his state for action.

Having distinguished the effect from the purpose and/or motives for the law, the Court's task, if anything, is to weigh the law's effect, not to try to quantify its purpose or the motives of the legislators who, as a body, enacted it. The Court is therefore faced in this case with the same questions as in *Vieth v. Jubelirer*: How much partisan effect is too much? How is it to be measured? The answers are the same as in *Vieth*: there are no neutral, objective standards that a court can apply.

II. THERE ARE NO JUDICIALLY MANAGEABLE STANDARDS FOR ASSESSING PARTISAN GERRYMANDERING

Various tests have been proposed for judicial resolution of political gerrymandering claims. All these tests have inherent partisan impacts. As the *Vieth* plurality explained, not one is either neutral or judicially manageable. *See Vieth*, plurality opinion at III.A. *Amicus curiae* respectfully offers the following additional analysis of potential tests.

In *Vieth*, Justice Stevens suggested that courts should test for impermissible partisan gerrymandering using the same standard that is employed in racial gerrymandering cases. *Vieth*, 541 U.S. at 339. That is, that courts should apply strict scrutiny if a state legislature has engaged in congressional redistricting with a predominant partisan purpose, "forsaking all neutral principles." *Id.*

The first problem with this test is that it would apply strict scrutiny to purpose rather than, as in other cases, to

effect.[7] When thus refocused, the test is somewhat tautological because to qualify for the test is to fail the test. A statute the predominant purpose of which is invalid would instantaneously fail the test, because the state necessarily could not articulate a compelling state interest, which is found in the legislative purpose. A second problem is in the labeling of the purpose. A valid purpose of redistricting is to restructure communities of political interest to better reflect changing politics. Yet, because in any such case the result will have partisan impact, a court could label the purpose as predominantly partisan. In construing a statute, though, a court has a duty to recognize any plausible valid purpose. *McDonald*, 394 U.S. at 809 ("Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent."); *McGowan v. State of Maryland*, 366 U.S. 420, 425-26 (1961). Characterizing the purpose of a statute in the worst possible terms is not the function of the courts. Characterizing the purpose in the best possible terms is the duty of a court, which must uphold the statute if at all possible. A third problem with the test is that it hypothesizes the existence of "neutral principles." There are none. For example, protecting incumbents is considered a valid principle for districting. Yet, incumbent protection has

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[7] Strict scrutiny looks at statutory effect on a fundamental right, then looks at the purpose to see whether the statute is narrowly tailored to advance a compelling state interest. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). Strict scrutiny is not itself a standard. It merely shifts the burdens. Strict scrutiny is unwarranted in partisan redistricting claims. *See Vieth*, plurality opinion. There is another key distinction between racial and partisan gerrymandering claims. The former focus on the district level, where evidence of them is largely found. The latter relate to overall state plans. *See* J.A. at 34 (report of Professor Alford).

partisan impacts and is really just a species of partisan gerrymander. Respecting municipal boundaries has likewise been considered a neutral principle, yet 19th century city and county lines have been ignored by the spread of residential and commercial development since World War II. Urban municipal boundaries, moreover, can be used to "pack" Democrats and minorities into districts to achieve partisan goals. Highway and public sewer corridors are arguably more relevant to defining communities of political interest, but attempting to use them also produces partisan effects, as well as "ugly" districts.[8] Ultimately, it must be acknowledged that the very concept of districting has implicit partisan aspects.

Justice Souter remarked in *Vieth* that courts should reach the conclusion that impermissible partisan gerrymandering has occurred when a plaintiff demonstrates: (1) that he is a member of a "cohesive political group"; (2) "that the [congressional] district of his residence . . . paid little or no heed" to traditional redistricting principles; (3) that there were "specific correlations between the district's deviations from traditional [re]districting principles and the distribution of the population of his group"; (4) that a hypothetical congressional district, which includes the plaintiff's residence, could remedy the packing or cracking of the plaintiff's group and deviates less from traditional redistricting principles; and (5) that "the defendants acted intentionally to manipulate the shape of the district [in question] in order to pack or crack his group." *Vieth*, 541 U.S. at 347-50. This test was addressed by the *Vieth* plurality. *Id.* at 296.

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[8] Because patterns of population growth have not conformed to anyone's idea of neatness or beauty, the courts should not use aesthetic criteria for evaluating the shapes of districts.

In addition, *amicus curiae* respectfully submits that members of "cohesive political groups" are impossible to identify on a state-wide, partisan basis. Unlike members of racial groups, whose identity is unchangeable, the political identity of a voter is changeable from election to election and candidate to candidate. Voter registration does not identify "cohesive political groups," because voters often cross party lines in the same election to vote for candidates of different parties. In Pennsylvania, for example, where Democrats have had about half a million more registered voters than Republicans, voters split tickets in 2000 and 2004, electing candidates of both parties in statewide races.[9] In 2000 and again in 2004, Pennsylvania voters picked a Democrat for president and a Republican for senator. One cannot call these shifting majorities a "cohesive political group." Even single-issue voters cross party lines: Pennsylvania has pro-choice Republicans as well as pro-life Democrats and vice-versa. Moreover, voters enjoy the protection of the secret ballot, so that even party workers may secretly split their tickets. Although Texas looks quite Republican at present, one cannot assume that Texas voters behave any differently. The right combination of issues and candidates could produce abrupt change.

Moreover, "traditional districting principles" should not become a constitutional standard when no basis for such exaltation exists. They may seem attractive, because courts are familiar with them, but such a freezing of past practices into constitutional doctrine would deprive legislatures of their distinctive function: the ability to

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[9] *See Almanac*, 2004 and 2006 editions.

envision the future and change the way things are done. The Court should not promote old practices that themselves have partisan effects, but that the Court is willing to condone.

Justice Breyer said that impermissible partisan gerrymandering involves "the *unjustified* use of political factors to entrench a minority in power." *Id.* at 360. In explaining his standard, Justice Breyer commented:

> By entrenchment I mean a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power. By *unjustified* I mean that the minority's hold on power is purely the result of partisan manipulation and not other factors. These "other" factors that could lead to "justified" (albeit temporary) minority entrenchment include sheer happenstance, the existence of more than two major parties, the unique constitutional requirements of certain representational bodies such as the Senate, or reliance on traditional (geographic, communities of interest, etc.) districting criteria.

Id. The *Vieth* plurality addressed this standard. *Id.* at 299. *Amicus curiae* respectfully submits, in addition, that defining when a party "holding power" is one "that enjoys only minority support" requires multiple exercises of subjective political judgment. To be "holding power," how many offices must a party hold and for how many election cycles? How does one determine whether a party enjoys only minority support? Does one look only to the most recent elections or does one give weight to the choices of voters of the past? A party whose support is waxing will want a court to weigh its present support. A party whose support is waning will contend that it is still a majority

party and want to include less recent elections in the scales.[10] Moreover, the court would have to adjust for significant factors that affected each election, such as the effects of incumbency, campaign spending, the relative quality of competing candidates, hot issues and even variances in weather across the state on election day. Whatever answers a court gives to these questions will have partisan impacts on the court's final assessment.

Amici King, *et al.* contend that there is a judicially manageable standard that is based on their concept of partisan symmetry. They advocate having the courts use computer programs to "examine all relevant election-related data" to calculate the difference in seats that two parties would win at a given vote level. Brief of *Amici* King, *et al.* at 9. However, as they acknowledge, there are different approaches and "inputs may vary." *Id.* at 10. Some of the variables include the presence of incumbents, whether races are contested, party registration, prior party control of the district, "candidate quality" and demographics. *Id.* Scandals and campaign spending, together with "relative campaign effectiveness and the like" are also issues.[11] How one weighs these factors is a subjective exercise. How strong is an incumbent? How poorly did a candidate handle debates? Can you reduce these subjective factors to numerical values? Ultimately, this approach requires a court to pick which expert it

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[10] If one does not dilute the present preferences of Texas voters by weighing the votes of the past, it would appear that the Democratic Party in Texas enjoys only minority support.

[11] Gelman and King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, Am. Journal of Political Sci., Vol. 38, No. 2, May 1994, at 544.

prefers. The expert's choices then become the court's choices. This approach would simply try to mask the political judgments that a court would be making, using experts and black boxes.

III. THE PARTISAN IMPACTS OF REDISTRICTING DO NOT AFFECT INDIVIDUAL RIGHTS

None of the appellants have shown that any of their rights have been impaired by the partisan impacts of redistricting. The Texas plan conforms to the one-person-one-vote requirement. Each voter has the right to cast a secret ballot. Each voter even has the right to write in a candidate on the ballot, if the candidates listed are not acceptable.[12] Like voters everywhere, voters in Texas can, and do, split their tickets.[13] Nobody has a right to have the candidate of their choice win. No candidate has a right to win election to public office.

Any candidate elected to Congress will generally tend to represent the overall interests of the constituency of the district.[14] This is why a Democrat elected in a conservative

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[12] TEX. ELEC. CODE ANN. § 146.001.

[13] *See* JACOBSON, THE POLITICS OF CONG. ELECTIONS (Addison-Wesley Educ. 5th ed. 2001) at 108 (noting a growing proportion of voters in congressional races "who vote contrary to their expressed party affiliation").

[14] Under the "median voter" theory, elected officials gravitate towards the position of the voter at the hypothetical equilibrium point of politics in the district. *See* Congleton, *The Median Voter Model*, Ctr. for Study of Pub. Choice, George Mason Univ. (2002) (visited on Jan. 29, 2006 *at* http://www.rdc1.net/forthcoming/medianvt.pdf). For a more complex model that incorporates both constituent interests and institutional concerns, *see, e.g.*, Lopez, *The Legislator as Political Entrepreneur: Investment in Political Capital*, The Review of Austrian Econ. (2002), 15:23, 211-228.

district migrates at least somewhat to the right of the party and a Republican in a liberal district moves at least somewhat to the left of the party. Regardless of party, the member tries to bring value to the district in constituent services, economic development and public projects.

The Court has been presented with the spectre of computers determining outcomes of elections, by the grouping of voters. However, no individual voter is an automaton in a computer-manipulated matrix. Each voter makes choices, candidate by candidate and office by office. Computers are simply sifting data to describe what real live people are doing at the ballot boxes. The computers are not directing their actions. This undeniable truth exposes the sham of concern about the impact of gerrymandering on individual voters.

A good candidate who has the feel of a district can defeat a bad candidate despite the best computerized cartography. In Pennsylvania, for example, an incumbent Republican was defeated in 2002, despite running in a heavily "Republican" district.[15]

The power of incumbency is nevertheless a major factor in holding down the turnover in congressional seats.[16] Voters get to know, and often to like, incumbents

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[15] *See Almanac*, 2006, p. 1465. The Democrat who won the 17th District in 2002 was reelected in 2004 by a bigger margin.

[16] While retention of incumbents is high, many factors other than gerrymandering contribute to it: "The list of possible causes for the growth of the incumbency advantage is quite long [and] includes the rise of candidate-centered politics, the increased use of the perquisites of office (such as porkbarreling, the franking privilege, credit claiming and casework), and rising campaign costs that inhibit effective challengers." Persily, *In Defense of Foxes Guarding Henhouses: The Case for*

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and usually choose to retain them. That they do so with high frequency does not mean that they are "controlled" or deprived of the right to choose. They are free to choose incumbency over other options.

The partisan effects of congressional redistricting, therefore, do not affect the rights of individual voters. Why then has redistricting engendered so much litigation?

The answer is that the fight, battled state by state, is really about the organizational control of the House of Representatives. This control matters to the parties and the members of the House. It determines the Speakership and committee chairs and affects many perquisites of office. But, it is not a judicially cognizable interest of the individual voter. The individual plaintiffs are, in actuality, merely proxies for the real combatants, the political parties.

In suits over alleged partisan gerrymandering, plaintiffs invoke the formula that they are "unable to elect the candidate of their choice." As demonstrated, when it comes to partisan redistricting, this is an empty, conclusory allegation and not one that shows the substance of any real harm.

IV. UPHOLDING THE TEXAS PLAN IS THE ONLY OUTCOME THAT EMBODIES JUDICIAL DEFERENCE TO LEGISLATIVE POLICY

To find for a partisan gerrymandering claim a court would be forced to make forbidden policy determinations

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Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 116 HARV. L. REV. 649, 666 (2002).

"about how this Nation is to be governed." *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring). In contrast, in one-person, one-vote cases, the courts accept and incorporate the basic legislative choices previously made.

This distinction between the two types of cases becomes clear in contemplating relief. Every one-person, one-vote case to date has been resolved either by a legislature enacting a new districting plan or, if the legislature is deadlocked, by a court drawing a new map. In the latter instance, when the court draws a map to achieve population equality, the court must deviate as little as possible from the previously enacted map, thus preserving the policy choices inherent in the map. *See White*, 412 U.S. at 795-97. But, if the courts task themselves with exorcising partisanship from mapmaking, they would not be able to use previous legislative enactments as the historical base for map-drawing because those plans are themselves infected with politics. Even if the judiciary tried to retain some "good" political choices by the legislature while discarding other "bad" partisan choices inherent in a previous enactment, the judiciary would still be making political choices and would find both its decisions and its decision-makers being critiqued for partisan bias.

The Court faces this problem here. It has three basic options in this case. First, if the Court affirms, elections will be held again under the Texas statute's map. Second, if the Court reverses, finding the statute unconstitutional, elections will occur under the plan adopted by the District Court in 2001, which substantially perpetuated the Democrat gerrymander of the '90s. This plan would be used until superseded. Third, the Court could conceivably find fault with both plans and order the District Court to allow

the Texas legislature an opportunity to create a new plan, using whatever criteria the Court adopts. If the legislature failed to do so, the District Court would have to draw a map, using the Court's criteria. All these choices have partisan, political effects, but only one is a proper course for the judiciary.

The current map embodies the most recent policy decisions of the legislature about how communities of political interest should be represented. Although the map, like any plan, has partisan impact, by upholding it the Court would be deferring to legislative policy on political issues. *Id.*

The second option, involving a reversion to the District Court's map, also embodies political choices of the legislature, in so far as it is based on the earlier statute. In that respect, it is no different than the present map. But the District Court's map reflects the legislative policy of more than a decade ago. When a later legislature passes a statute that is inconsistent with an earlier, unrepealed statute, the courts do not choose which they prefer. The courts give effect to the later enactment, deferring to the most recent policy of the legislative branch, rather than making a policy choice themselves. *See Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936). Implicit in this deference is a recognition that new legislatures are elected so that they can adapt policy to fit changing times and evolving constituencies. So, too, in redistricting, the courts should always defer to the legislative determination that was made closest to the present time. Otherwise, the courts would be expressing a preference for past policy, yet applying it to present circumstances.

The third choice, perhaps unlikely but possible, would represent a political decision by the Court to discard all prior legislative policy choices and to start over with a blank paper and new tools. This, however, would require the Court not just to reject legislative guidance, but also to make subjective choices about how to measure partisan bias and how much bias is an acceptable amount. To be fair, the standards would have to apply consistently, both to legislative and judicial mapmaking. The Court could not in good conscience use one standard to overturn the current statute, yet fail to apply it to the District Court's plan or to the drafting of a new plan. For example, the Court should not use conformity to traditional municipal boundaries as a standard of review for a legislative map, then waive the standard for a court to draw a map (because the standard tends to compact minorities and Democrats into cities). In any event, because there are no neutral standards either for measuring bias or for avoiding it in mapmaking, the third option would put the judiciary on the political spot.

The Court's decision in this case will obviously have partisan political impact regardless of which option it chooses. However, only the first option, affirmance, allows the judiciary to avoid making policy choices about current politics and communities of political interest by deferring to the political branch of state government.

V. INTRA-DECENNIAL REDISTRICTING IS WITHIN THE DISCRETION OF THE LEGISLATURE

Article I, Section 4 of the United States Constitution provides that the "time, places and manner of holding Elections for Senators and Representatives shall be

prescribed in each State by the Legislature thereof; but Congress may at any time by Law make or alter such regulations[.]" U.S. CONST. art. I, § 4 (emphasis added). "[T]hese comprehensive words embrace authority to provide a complete code for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *United States v. Classic*, 313 U.S. 299, 311 (1941) ("states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress").[17] *See also Wesberry v. Sanders*, 376 U.S. 1, 33 (1964) (Harlan, J., dissenting) ("the Convention understood the state legislatures to have plenary power over the conduct of elections for Representatives, including the power to district well or badly, subject only to the supervisory power of Congress").[18]

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[17] Appellee Henderson argues that various limits in early state constitutions should be imputed to exist in the federal Constitution as some form of limitation on the power of the states. Brief of Henderson at 8 *et seq.* The opposite inference is correct. If the Framers knew about such limits yet did not put them into the text of the Constitution, they must have chosen not to restrict the power granted to the state legislatures.

[18] The Framers knew that the authority they were giving to the states included the power to "gerrymander." They gave Congress the power to override any state regulation that Congress deemed contrary to the nation's interests. Ironically the power given to the states was not controversial, but Congress's proposed supervisory power was contested in the Convention. When Pinckney and Rutledge moved to strike the grant of power to Congress, Madison defended it:

> The necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. . . . It was impossible to foresee all the abuses that might be made of the discretionary power. . . . Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as *to favor the*

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Over time, Congress has repeatedly exercised its supervisory power. In 1842, Congress enacted a statute requiring all House representatives to be elected from single-member, contiguous districts. *See* Act of June 25, 1842, 5 Stat. 491. In 1872, Congress enacted a statute requiring vacant House seats to be filled by way of special elections held every second year on the first Tuesday in November. Act of Feb. 2, 1872, 17 Stat. 28. In 1882, Congress enacted a statute requiring congressional districts to contain "as nearly as practicable an equal number of inhabitants." Act of Feb. 25, 1882, 22 Stat. 5. In 1901, Congress enacted a statute requiring that congressional districts be compact as well as contiguous. Act of Jan. 16, 1901, 31 Stat. 733. Then, in 1929, Congress allowed all the aforementioned requirements but one to lapse. *See* Act of June 18, 1929, 46 Stat. 21; *Wood v. Broom*, 287 U.S. 1, 7 (1932). Today, the only constraint that Congress has placed on congressional redistricting in the states is the requirement that Representatives be elected from single-member districts, although election on a statewide basis is permitted under certain uncommon circumstances. *See* 2 U.S.C. §§ 2c, 2a(c); *see also Branch v. Smith*, 538 U.S. 254 (2003).

Although Congress has exercised its supervisory power before, it has never used that power to address intra-decennial redistricting. Because the legislatures have comprehensive power in the absence of congressional

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> *candidates they wished to succeed*. . . . What danger could there be in giving a controuling power to the Natl. Legislature?

II RECORDS OF THE FED. CONVENTION OF 1787 at 240 (M. Farrand ed. 1911) (1937 Revised ed.) (emphasis added). Madison's remarks show that the Framers knew that art. I, § 4 empowers the states to do precisely what has since become known as gerrymandering.

limitation, it follows that intra-decennial redistricting is within their discretion.

History shows that the generation that ratified the Constitution believed that state legislatures had the power to engage in intra-decennial congressional redistricting. Throughout the decade immediately following ratification of the Constitution, state legislatures regularly altered the way in which members of Congress were elected.

Pennsylvania's General Assembly adopted different plans for congressional elections in 1788, 1790, 1792 and 1794. *Compare* 13 Pa. Stat. at Large (1682-1801) at 140-45 (Oct. 4, 1788) (providing for the at-large election of eight representatives) *with* 14 Pa. Stat. at Large (1682-1801) at 20-23 (Mar. 16, 1790) (providing for eight congressional districts and one representative per district) *with* 14 Pa. Stat. at Large (1682-1801) at 271-74 (Mar. 16, 1791) (providing for the at-large election of thirteen representatives) *with* 15 Pa. Stat. at Large (1682-1801) at 171-74 (Apr. 22, 1794) (providing for twelve congressional districts and thirteen representatives). *Id.*[19]

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[19] The first federal elections in Pennsylvania "were in large measure the continuation of a struggle between two well-defined political parties." I DOCUMENTARY HISTORY OF THE FIRST FED. ELECTIONS 1788-1790 (Univ. of Wisc. Press 1976) at 229. The Pennsylvania Assembly seems to have chosen methods of election for Congress based on considerations of partisan advantage. In 1788, for example, most Federalists were in Philadelphia and district elections would have given them fewer seats than an at-large election. "By obliging the whole state to vote in one ticket, it is expected the Federalists will prevail by a majority of two to one in the choice of Representatives for the lower house of Congress." *Id.* at 302 (quoting Benjamin Rush). For the 1788 congressional elections, some states used at-large elections while others used districts. *Id., passim.*

During the same period, the New Jersey legislature flip-flopped on its congressional election policies. *Compare* N.J. Act of May 29, 1792 (providing for the at-large election of five representatives) *with* N.J. Act of Mar. 1, 1798 (providing for five congressional districts and one representative per district) *with* N.J. Act of Nov. 7, 1800 (providing for the at-large election of five representatives).[20] Massachusetts switched from having four multi-member districts in 1792 to having single-member districts in 1794. *Compare* Mass. Resolves, June 30, 1792, p. 25 *with* Mass. Act of June 26, 1794.

That state legislatures freely altered the way in which members of Congress were chosen from one election to the next and that the alterations were never challenged on constitutional grounds are facts that show intra-decennial changes were consistent with the legal and popular understanding of the newly-ratified Constitution.

Furthermore, intra-decennial congressional redistricting does not undermine the one-person, one-vote doctrine embodied by the Equal Protection Clause of the Fourteenth Amendment. The Appellants, here, argue that when state legislatures engage in intra-decennial congressional redistricting, lawmakers pursuing a partisan agenda are able to use their knowledge of post-census population shifts to produce congressional districts that appear (in light of the most recent decennial census data) to have populations equal to those in other congressional

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[20] New Jersey's switch back to at-large election for 1800 must have had partisan impact. *Amicus* does not know at this time which party sought advantage in New Jersey through such changes, but in 1800 there was a partisan realignment, with the Federalists losing and Jeffersonian Republicans taking control of the House.

districts but that in reality are packed with voters from the disfavored political party. However, their fears of such tactics, although unwarranted, should extend as well to the very first possible redistricting after a census. This is because decennial census data are *always* inaccurate, even at the moment they are released. The federal government takes approximately 1.3 years to complete a census and to release the attendant data, *see* U.S. CENSUS BUREAU, FREQUENTLY ASKED QUESTIONS (Oct. 12, 2004), *available at* http://www.census.gov/dmd/www/genfaq.htm. Census data are afflicted by a minimum 13% margin of inaccuracy at the moment they are released. Assuming an additional, natural inaccuracy margin of 5% (a modest assumption, considering the large number of citizens who either refuse to participate in a typical census or participate multiple times),[21] decennial census data may be up to 18% inaccurate when released.

Nevertheless, the census represents the only attempt at an actual population count that the nation has.[22] It is

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[21] Undercount rates for the 2000 census may have been: 0.67% for non-Hispanic whites, 0.96% for Asians, 2.17% for blacks, 2.85% for Hispanics, and 4.74% for Native Americans and Alaskans. *See* PRESIDENTIAL MEMBERS, U.S. CENSUS MONITORING BD., FINAL REPORT TO CONG. 7 (2001). The undercount rate for blacks was more than 3% higher than the national undercount average in every decennial census between 1940 and 1990. Hogan and Robinson, *What the Census Bureau's Coverage Evaluation Programs Tell Us About Differential Undercount* § 1 (unpublished manuscript, presented at the Research Conference on Undercounted Ethnic Populations, May 5-7, 1993), *available at* http://www.census.gov/population/www/documentation/1993/conference.html.

[22] The Census Act requires an actual count of population to be used for apportionment. Section 195 of the Census Act, 13 U.S.C. § 195; *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 340 (1999) ("there is only one plausible reading of the amended § 195 [of

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not the Court's function to put a shelf-life date on it. Moreover, there has never been an instance of a court depriving an elected legislature of its right to exercise a continuing review and amendment of the laws under which we are governed.[23] A "one shot" rule would be both unprecedented and contrary to the fundamental nature of the legislative process in a democracy.

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the Census Act]: It prohibits the use of sampling in calculating the population for purposes of apportionment").

[23] Fears have also been expressed that intra-decennial redistricting will be used more frequently to improve margins of control in an increasingly polarized and partisan House. These fears are misplaced for two reasons.

Any experienced state legislator knows that redistricting consumes vast amounts of time and energy. Even when the same party is in the majority, the two chambers of the legislature can have difficulty reaching agreement, as the record in Texas shows. Therefore, states would not lightly undertake intra-decennial redistricting. It is not apparent that Texas has started a broad revival of the practices of the 1790s.

Furthermore, the House of Representatives is not polarized due to redistricting. The un-gerrymander-able Senate is at least (and perhaps more) polarized on a partisan basis. For example, in both the Clinton and Bush administrations, the Senate has been controlled by a partisan opposition that refused to bring many judicial nominations to a vote. *See* REHNQUIST, 1997-2002 YEAR-END REPORTS ON THE FEDERAL JUDICIARY.

CONCLUSION

Amicus curiae Senator Robert C. Jubelirer respectfully requests that this Court affirm the district court's judgment for the reasons stated above.

Respectfully submitted,

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Nos. 05-204, 05-254, 05-276, 05-439

IN THE

Supreme Court of the United States

EDDIE JACKSON; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; TRAVIS COUNTY; GI FORUM OF TEXAS,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

On Appeal from the United States District Court of the Eastern District of Texas

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BRIEF OF *AMICI CURIAE* PROFESSORS GARY KING, BERNARD GROFMAN, ANDREW GELMAN, AND JONATHAN N. KATZ, IN SUPPORT OF NEITHER PARTY

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INTERESTS OF *AMICI CURIAE*

Amici are professors of political science, government, and statistics who have written, published, and testified about partisan bias in redistricting.[1] They have testified on behalf of States and of private parties. They have testified in favor of Democratic plans in some instances and in favor of Republican plans in others. They have written and published extensively on the subjects of voting rights and statistical methods and more specifically on redistricting. And they have won numerous prizes and awards for their work in this area. *Amici* take no position on whether the Texas redistricting plan at issue in this case is unconstitutional. Rather, they write to explain that an "agreed upon substantive principle[] of fairness in districting" exists. *Vieth v. Jubelirer*, 541 U.S. 267, 312-13 (2004) (Kennedy, J., concurring in the judgment).

Amicus Gary King (http://gking.harvard.edu) is the David Florence Professor of Government and the Director of the Institute of Quantitative Social Science at Harvard University. He has been elected Fellow of the American Association for the Advancement of Science, Fellow of the American Academy of Arts and Sciences, Fellow of the American Academy of Political and Social Science, President of the Society for Political Methodology, and Vice President of the American Political Science Association. Along with Andrew Gelman, he wrote the software program JudgeIt, which is a widely-used tool for measuring partisan bias in districting plans.

Amicus Bernard Grofman (http://www.socsci.uci.edu/~bgrofman/) is Professor of Political Science at the University of California, Irvine. He has been elected Fellow of the

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel has made a monetary contribution toward its preparation or submission. By letters filed with the Clerk, counsel for all parties have consented to this filing.

American Academy of Arts and Sciences and President of the Public Choice Society. This Court cited his work in *Thornburg v. Gingles*, 478 U.S. 30, 52-53 & n. 20 (1986), and both this Court and other federal courts have cited his research on racial voting patterns and other topics related to elections.

Amicus Andrew Gelman (http://stat.columbia.edu/~gelman/) is Professor of Statistics and Professor of Political Science at Columbia University. He has been elected Fellow of the Institute of Mathematical Statistics and Fellow of the American Statistical Association, and is the founding director of the Quantitative Methods in the Social Sciences program at Columbia. As noted, he and Gary King wrote the software program JudgeIt.

Amicus Jonathan N. Katz (http://jkatz.caltech.edu/) is the Co-Director of the Caltech/MIT Voting Technology Project. He is Professor of Political Science at the California Institute of Technology and Director of Graduate Studies for the Social Sciences. He is also currently a Fellow at the Center for Advanced Study in the Behavioral Science at Stanford University. He is on the editorial boards of *Political Analysis*, *Political Research Quarterly*, and the *American Journal of Political Science*.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the partisan gerrymandering context, this Court has not adopted any governing rule to determine whether a plan is unconstitutional. The Court may or may not choose to do so in this case. If the Court chooses to do so, however, a principle known as the symmetry standard presents a "substantive definition of fairness in districting" that "command[s] general assent." *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment). The symmetry standard compares how similarly-situated political groups would fare hypothetically if they each (in turn) receive the

same given percentage of the vote. The difference in how parties would fare in terms of legislative seats is the "partisan bias" of the electoral system.

While *amici* take no position on whether this Texas plan is constitutional, the ability to measure partisan bias using objective and neutral criteria allows this Court to determine when a particular plan crosses the constitutional threshold. Three potential approaches are (1) a rule that creates as little partisan bias as possible; (2) a rule that prevents a political party from gaining a seat to which it otherwise would not be entitled; or (3) a rule prohibiting egregious gerrymanders that show a bias over a certain percentage.

ARGUMENT

I. THE "SYMMETRY STANDARD" DEFINES PARTISAN FAIRNESS IN LEGISLATIVE REDISTRICTING

"The object of districting is to establish 'fair and effective representation for all citizens.'" *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565-68 (1964)). This Court and other courts consistently determine whether States have crossed the constitutional line by drawing districts in a manner that impermissibly burdens one group or another. In the racial context, for example, courts have examined the shape and appearance of district lines in order to resolve whether a State was engaging in a racial gerrymander. *See, e.g, Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Shaw v. Reno*, 509 U.S. 630 (1993).

In the partisan gerrymandering context, dissenting Justices have proposed examining a variety of criteria such as shape, compactness, contiguity, and respect for political subdivisions in order to determine whether a plan unconstitutionally burdens a particular group. *See, e.g., Davis v. Bandemer*, 478

U.S. 109, 165 (1986) (Powell, J., dissenting) (looking to the "configurations of districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of districting"); *Vieth*, 541 U.S. at 335 (Stevens, J., dissenting); *id.* at 347-48 (Souter, J., dissenting). While all of these criteria may have some value, they are simply proxies for determining what is normally the fundamental issue in partisan gerrymandering cases: whether a districting plan unfairly burdens the representational rights of a particular political group.

As this Court has recognized, because criteria such as compactness and traditional political boundaries are merely proxies, they do not provide judicially-manageable standards that courts can apply in politically-neutral and even-handed ways. *See, e.g., Vieth*, 541 U.S. at 307-309 (Kennedy, J., concurring in the judgment); *id.* at 289-90 (plurality opinion); *id.* at 359-60 (Breyer, J., dissenting); *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring in the judgment). In addition, as legislators employ more and more sophisticated tools for redistricting, they can comply quite easily with some of these criteria while still burdening the right to fair and effective representation through political gerrymandering. *Cf. Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) (recognizing that technology gives parties even more "temptation to use partisan favoritism in districting").

In evaluating political fairness, social scientists do not use proxies to measure the existence and extent of partisan bias. Instead, they have defined a clear and appropriate standard for what constitutes partisan fairness. It is called the symmetry standard. The symmetry standard was not before the Court in *Vieth*, 541 U.S. at 267.

The symmetry standard measures fairness in election systems, and is not specific to evaluating gerrymanders. The symmetry standard requires that the electoral system treat similarly-situated political parties equally, so that each

receives the same fraction of legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage. In other words, it compares how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote. The difference in how parties would fare is the "partisan bias" of the electoral system. Symmetry, however, does not require proportionality.

For example, suppose the Democratic Party receives an average of 55% of the vote total across a state's district elections and, because of the way the district lines were drawn, it wins 70% of the legislative seats in that state. Is that fair? It depends on a comparison with the opposite hypothetical outcome: it would be fair only if the Republican Party would have received 70% of the seats in an election where it had received an average of 55% of the vote totals in district elections. This electoral system would be biased against the Republican Party if it garners anything fewer than 70% of the seats and biased against the Democratic Party if the Republicans receive any more than 70%.

In other words, the symmetry standard is that "each political group in a State [has] the same chance to elect representatives of its choice as any other political group." *Davis v. Bandemer*, 478 U.S. at 124. The symmetry standard is a "clear, manageable, and politically neutral" measure of "the particular burden a given partisan classification imposes on representational rights." *Vieth*, 541 U.S. at 307-08 (Kennedy, J., concurring in the judgment). The symmetry standard can be used in all types of election systems and districting arrangements, such as single-member districts, multimember districts, or any other valid electoral rule. Moreover, it works regardless of the number of parties that field candidates. *See, e.g.*, Gary King, *Electoral Respons-*

iveness and Partisan Bias in Multiparty Democracies, 15 Leg. Stud. Q., 159, 163-65 (1990).[2]

The symmetry standard has been the subject of scholarly work for at least three decades. *See, e.g.*, Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*. 67 Am. Pol. Sci. Rev. 540 (1973); Bernard Grofman, *Measures of Bias and Proportionality in Seats-Votes Relationships*, 9 Am. Pol. Sci. Rev. 295, 327 (1983); Andrew Gelman & Gary King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, 38 Am. J. Pol. Sci. 514 (1994). The scholarly literature has been united in supporting the symmetry standard as the definition of partisan fairness in electoral systems at least since the clarification of the standard introduced by Gary King and Robert X. Browning in *Democratic Representation and Partisan Bias in Congressional Elections*, 81 Am. Pol. Sci. Rev. 1251 (1987). *See, e.g.*, Dennis Thompson, *Election Time: Normative Implications of Temporal Properties of the Electoral Process in the United States*, 98, Am. Pol. Sci. Rev. 51, 53 n. 7 (2004); Thomas W. Gilligan & John G. Matsusaka, *Structural Constraints On Partisan Bias Under The Efficient Gerrymander*,

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[2] Indeed, the symmetry standard is itself a reflection of fundamental American tenets such as fairness and equality of treatment. It stems from the same principle that drives the belief that the legislative candidate with the most votes in a district should win the seat. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."). In particular, elections are "fair" when they set objective and symmetrical guidelines for determining who wins: One candidate can win with a plurality of votes because if another candidate had received a plurality of votes instead, that other candidate would have won the seat. Fairness exists because the political process treats each candidate equally. The symmetry standard takes this same principle and applies it to political groups at the statewide level.

100 Pub. Choice 65, 65 (1999); Ernesto Calvo & Maria Victoria Murillo, *Who Delivers? Partisan Clients in the Argentine Electoral Market*, 48 Am. J. Pol. Sci. 742, 747 (2004); Erik J. Engstrom & Samuel Kernell, *Manufactured Responsiveness: The Impact of State Electoral Laws on Unified Party Control of the Presidency and House of Representatives, 1840-1940*, 49 Am. J. Pol. Sci. 531, 541 (2005). In short, "[s]cholars have reached near consensus on *partisan symmetry* as a standard of partisan fairness and have made great progress on developing measures that can be used to see whether electoral systems and districting plans meet this standard." Gary King, John Bruce & Andrew Gelman, *Racial Fairness in Legislative Redistricting*, in *Classifying by Race* 85, 85 (Paul E. Peterson, ed., 1996).

The symmetry standard also is a regular feature of expert testimony in redistricting litigation. Experts representing both political parties use it, as do neutral officials such as courts and non-partisan members of redistricting commissions. Indeed, in this very litigation, experts from both sides used the symmetry standard to ascertain whether the plan was biased. *See* Expert Report of John R. Alford at 26-27 & Graph 2, Jackson Pls. Exh. 44 (Expert for Plaintiffs); Expert Report of Ronald Keith Gaddie, Jackson Pls. Exh. 141 at 18-22 & Fig. 1 (Expert for the State); Gaddie Report at 18 (noting that the three-judge panel which drew the non-partisan map in 2001 measured partisan bias by using the approach "widely accepted by the experts involved in this matter, and it is the approach used here to facilitate comparison").

Measuring symmetry and partisan bias does *not* require "proportional representation" (where each party receives the same proportion of seats as it receives in votes). Of course, an electoral system that is proportional, like any electoral